

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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FILE: B-196652

DATE: January 11, 1980

MATTER OF: Jose Lujan, et. al. <sup>[Claim for]</sup> retroactive temporary promotion and backpay

DIGEST: National Guard technicians, whose positions as Aircraft Mechanics, WG-10, were prevailing rate positions in excepted service, filed claims for retroactive temporary promotion and backpay under Turner-Caldwell line of decisions alleging improperly extended details to positions as Aircraft Mechanics (Crew Chief), WG-12. Although the positions in question are beyond the scope of coverage set forth in section 8-2, subchapter 8, chapter 300, Federal Personnel Manual, claims may be independently evaluated and adjudicated where nondiscretionary agency regulation extends coverage of FPM detail provisions to National Guard technicians in hourly wage pay plan positions.

This decision is in response to the request of Mr. Jose Lujan, and 17 additional claimants who are similarly situated, for reconsideration of their claims for retroactive temporary promotion and backpay which were disallowed by our Claims Division on November 22, 1978.

Although the specifics of individual claims vary, in general the 17 technicians claim that while occupying the positions of Aircraft Mechanic, WG-10, in the New Mexico Air National Guard, they were detailed to positions as Aircraft Mechanic (Crew Chief), WG-12, without prior approval of the Civil Service Commission (CSC) (now Office of Personnel Management) for an extended period in excess of 120 days. Thus they contend that they are entitled to retroactive temporary promotions with backpay under our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), affirmed at 56 id. 427 (1977).

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Our Claims Division found that the position of Aircraft Mechanic, WG-10, was a prevailing rate position in the excepted service. Since the position was neither in the competitive service nor under the General Schedule, the Settlement Certificate issued to the individual claimants typically concluded as follows:

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"Decisions authorizing retroactive temporary promotions for employees detailed in excess of 120 days are based on the requirement, found in the Federal Personnel Manual, chapter 300, subchapter 8, paragraph 8-4f, that agencies must obtain prior approval from the CSC for any detail that will exceed 120 days. An agency's failure to follow this nondiscretionary regulation is considered an unjustified or unwarranted personnel action under the Back Pay Act (5 U.S.C. 5596), and thus warrants the remedy of a retroactive temporary promotion. However, section 8-2 of subchapter 8 specifies that the material in that subchapter applies only to details within the same agency of employees serving in competitive positions or in positions under the General Schedule.

"Since the position in which you were serving was neither in the competitive service nor under the General Schedule, the provisions of subchapter 8 do not apply to your situation, and we may not grant the remedy of a retroactive temporary promotion."

The claimants base their requests for reconsideration on the following provision in para. 300.8-2 of the National Guard Bureau's Technician Personnel Manual as amended September 18, 1972:

"The material covered in this subchapter will apply to all National Guard technicians in positions under the General Schedule and hourly wage pay plans."

They contend that this provision expands the applicable authority of section 8-2 of subchapter 8, chapter 300, of the Federal Personnel Manual (FPM) to include National Guard technicians in positions under hourly wage pay plans, notwithstanding that those positions may be excepted from the competitive service. On this basis they argue that their claims for retroactive temporary promotion and backpay should have been considered on their merits by our Claims Division. In accordance with the following analysis we concur with this view.

The Technician Personnel Manual (TPM) is the National Guard Bureau's official publication on matters of National Guard technician personnel management. Pursuant to authority provided in the National Guard Technicians Act of 1968, Public Law 90-486, August 13, 1968, 82 Stat. 755 (32 U.S.C. § 709), this publication is prescribed by the

Secretary of the Army and the Secretary of the Air Force and approved by the Secretary of Defense for the administration of National Guard technicians. The purpose of the directive is to supplement the FPM in lieu of Army and Air Force civilian personnel regulations that are generally not applicable to National Guard technicians. Thus, as Federal employees, technicians are subject to Civil Service laws and CSC and Department of Defense civilian personnel rules and regulations, except as modified by the Technician Personnel Manual.

Although the remedy of retroactive temporary promotion recognized by the Turner-Caldwell line of decisions is based on the CSC's instructions at FPM chapter 300, subchapter 8 requiring the Commission's approval of certain details in excess of 120 days, an agency, by its own regulation or by the terms of a collective-bargaining agreement may establish more restrictive circumstances under which it becomes mandatory to promote an employee detailed to a higher-grade position. In Kenneth Fenner, B-182937, June 23, 1977, we noted that under 5 U.S.C. 301 and as specifically provided for at FPM chapter 171 an agency may promulgate supplemental personnel regulations and policies for its employees within the general framework of and consistent with CSC regulations. That case involved a Customs Service regulation requiring the temporary promotion of an employee detailed beyond 60 rather than 120 days. Also see 56 Comp. Gen. 786 (1977) and 57 id. 536 (1979).

As indicated by the above-quoted statement from our Claims Division's settlements, the CSC's instructions at FPM chapter 300, subchapter 8 are not applicable to employees who, like the 18 claimants, were detailed between prevailing rate positions in the excepted service. See Israel Warshaw, B-194484, September 21, 1979. However, as the claimants have pointed out, para. 300.8-2 of the TPM was amended September 18, 1972, to extend the detail provisions of that subchapter of the FPM to National Guard technicians employed under hourly wage pay plans, including those in the excepted service. As to technicians under the General Schedule as well as those under hourly wage plans, TPM para. 300.8-4 requires the preparation and submission of a Standard Form 59 to the Chief of the National Guard Bureau requesting extension of the detail beyond 120 days and provides insofar as required, that the request will be forwarded to the appropriate Area Office of the CSC. Thus, the National Guard Bureau's instructions recognize that requests to extend the details of individuals not covered by the FPM provisions need not be forwarded to the CSC for approval, but contemplate, subject to the National Guard Bureau's own authority to approve extensions, that technicians employed in the excepted service under hourly wage plans not be detailed for periods in excess of 120 days.

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In view of these findings we conclude that effective September 18, 1972, the provisions of para. 300.8-2 of the TPM extended the scope of section 8-2 of subchapter 8, chapter 300 of the FPM to include all National Guard technicians in hourly wage pay plan positions. This nondiscretionary agency policy is binding upon the agency in the evaluation of claims for retroactive temporary promotion and backpay.

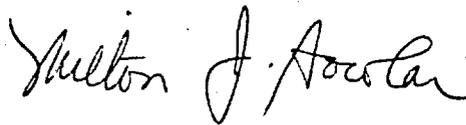
However, in concluding that the 18 claims for retroactive temporary promotion and backpay for specified periods subsequent to September 18, 1972, are properly subject to adjudication on their merits by our Claims Division, we are not rendering a decision on the actual settlement of any individual claim. Our Turner-Caldwell line of decisions holds that employees detailed to higher-grade positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. As our Claims Division noted in the Settlement Certificate, the rationale of those decisions is that an agency has no discretion to continue employees' details beyond 120 days without the Civil Service Commission's approval. In the cases of the 18 National Guard Bureau technicians, discretion to extend details beyond 120 days was constrained by the requirement to obtain approval within the Bureau. When an agency continues a detail without authority, corrective action in the form of a retroactive temporary promotion with backpay is required as of the 121st day of the detail, for the employee, provided the employee was otherwise qualified and could have been temporarily promoted into the position at that time. 56 Comp. Gen. 982 (1977).

As a result, our decisions following Turner-Caldwell have held that the employee must first satisfy the statutory and regulatory requirements for a temporary promotion or there will be no remedy for an improperly extended detail. See 58 Comp. Gen. 88 (1978); and 56 id. 432 (1977). Among these requirements are time-in-grade specifications and the qualification standards for the position to which the employee is detailed. See FPM Bulletin 300-40, paragraph 8C, May 25, 1977. In addition, as in all claims adjudications, the burden of proof is on the claimant to establish the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7 (1979). Thus, before any settlement awarding retroactive temporary promotion and backpay may be certified, the claimant must present competent evidence establishing that he was officially detailed to an existing, classified, higher-grade position, and that he did in fact perform the full range of duties of the higher-grade position

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during those periods specified in his claim which are not barred and which are subsequent to September 18, 1972. See John R. Figard, B-181700, January 18, 1978.

Accordingly, we are returning Mr. Lujan's claim, along with the claims of the 17 similarly situated individuals, to our Claims Division with instructions to evaluate and adjudicate each claim on a case-by-case basis consistent with this decision.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For The Comptroller General  
of the United States